In the Supreme Court of the United States

OCTOBER TERM, 1961

NO. 359

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*

v.

WADE LAHAR CONSTRUCTION COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

HERSCHEL H. FRIDAY, JR.
1100 Boyle Building
Little Rock, Arkansas
Attorney for Respondent.

PARKIN PRINTING & STATIONERY CO., LITTLE ROCK

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Pursuant to the provisions of Supreme Court Rule 40, the Respondent is not repeating the provisions of the petition pertaining to "Opinion Below", "Jurisdiction" and "Statute Involved", but will comment concerning "Questions Presented" and "Statement".

QUESTIONS PRESENTED

It is the position of Respondent that the first question, stated by Petitioner simply poses a fact question that has been resolved against the Petitioner by both courts below. The

question really presented by Petitioner is whether the courts, in a Fair Labor Standards Act case, must accept a congressional legislative determination of "in commerce" on an entirely different question and in an entirely different setting (that is, that the Congress can constitutionally authorize and appropriate money for these overall projects) as conclusive and as depriving the courts of the authority and responsibility of finding the facts and determining whether employees of an employer are "in commerce" in the Fair Labor Standards Act statutory sense, even though the actual facts are that the work of the employees involved was not an integral or necessary part of the overall project but was strictly of a local nature.

The second question, as stated by Petitioner, is predicated upon a "fact" that one of the principal purposes of the work done by the employees was to improve the navigability of the interstate lake, whereas this was merely an isolated statement of one of the Petitioner's witnesses in the trial before the District Court and the facts as actually found were that the purpose of the work was entirely local in nature for recreational purposes and that the overall project (much less the clearing work) was not a "navigation project".

STATEMENT

Respondent refers the Court to the Findings of Fact in the Opinion of the District Court, 179 F. Supp. 551, and in the Opinion of the Court of Appeals, 290 F. 2d 408 and will only discuss certain statements in Petitioner's statement concerning which, Respondent believes, some elaboration is required. The statement that the White River is considered navigable downstream from Branson, Missouri should be compared with the finding of the District Court, appearing on page 561 of 179 F.

Supp. as follows. "It was definitely established that the White River is not navigable at this point, and that the construction of the dam was not intended to aid or improve navigation above the dam site", and with the testimony of the Corps of Engineers witness for the Petitioner that "this is not a navigation project" (R. 35). The references to House Document No. 917 must be considered in the context of the legislative determination being made, that is, the Congress was determining whether under the full scope of its congressional power under the commerce clause it could authorize and appropriate money for these overall projects. Specifically, the Congress has not made a legislative determination that the overall project or any phase thereof was in commerce in the Fair Labor Standards Act statutory sense. The reference to the Respondent having performed fifty-six clearing jobs since its incorporation in 1952 is not entirely accurate in that fifty-six referred to the total number of jobs of the Respondent's general contracting business of which the Respondent complied fully with the Fair Labor Standards Act on all but nine jobs. A determination was made as to each job after obtaining the advice of counsel (R. 51, 52). The statement that the Respondent's clearing operations covered 12,700 acres, including about 122 miles of shoreline in the reservoir, must be considered in context. The entire reservoir contained approximately 52,000 acres, of which 10,000 lie above contour line 915; there is a total of 857 miles of shoreline; and only a little over 14% of the shoreline was cleared. (See Findings set forth in Opinion of the Court of Appeals appearing on pages 26 and 41 of the Petition, and R. 46). Concerning the testimony of Mr. Pyle, the Corps of Engineers witness for the Petitioner, and the testimony of witnesses for Respondent, reference must be made to the Record to get the full import thereof. Also, reference is made to the Findings of the lower court, and in particular to pages 558 and 559 of 179 F. Supp. and to

the factual analysis of the Court of Appeals appearing on pages 40 and 41 of the Petition, particularly paragraphs "F" and "G" of the Court of Appeals Opinion. According to the Court of Appeals, Mr. Pyle "recognized the change, since the Norfolk Dam was built, in official attitude as to the necessity of clearance and admitted that one of the plans studied provided only 'for a very small amount of clearing' at the 'access points and the main public access'; that floating material would not bother the penstocks at all; that 'that type of clearing in the vicinity is desirable * * * I would be inclined to say that it is not necessary * * *': that he didn't expect trouble: that 'it was cleared to control mosquitoes and for boat passage, the boats being primarily recreational boats' and that 'this is not a navigation project'." The Court of Appeals then stated in paragraph "G" that aside from the testimony the significant nature of the clearing itself "compels the conclusion that protection of the dam, if it were present as a factor at all, was no more than a consequential motive in the clearing."

ARGUMENT

UNDER THE APPLICABLE STANDARDS SET FORTH IN THE RULES AND DECISIONS OF THIS COURT, THE PETITION SHOULD BE DENIED.

Supreme Court Rule 19 specifies that a review on writ of certiorari is not a matter of right but of sound judicial discretion and "will be granted only where there are special and important reasons therefor". The rule then sets forth the character of reasons which will be considered, and among those are where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter, or has decided an important question of federal law which has not been, but should be, settled, or has decided a federal question in a way in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for this Court's supervision. The Petitioner appears to place principal reliance upon a conflict with decisions of other courts of appeals and upon the decision below being in conflict with applicable decisions of this Court.

In *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 393, 67 L. Ed. 712, Mr. Chief Justice Taft, speaking for a unanimous court, stated:

> "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

In *Rice v. Sioux City Cemetery*, 349 U. S. 70, 99 L. Ed. 897, it is stated, on page 901 of 99 L. Ed.:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Citations) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic".

This Court has been very careful to deny petitions for certiorari at any stage of the proceedings when it appears that there are no special and important reasons therefor. *Rice v. Sioux City Cemetery*, supra; *SS Monrosa v. Carbon Black Export*, 359 U. S. 180, 3 L. Ed. 2d 723. See also *District of Columbia, Petitioner v. James J. Sweeney*, 310 U. S. 631, 84 L. Ed. 1402, wherein it is stated:

> "Denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

When these standards are applied to the Petition, it must be denied.

A. THE REASONS ASSERTED BY PETITIONER ARE NOT SUFFICIENT.

Petitioner asserts two grounds, the first being that the Court of Appeals adopted an approach which fragmentized work performed on integrated projects in interstate commerce and alleges that a contrary conclusion on essentially similar facts has been reached by four other circuits, and the second being that the Court of Appeals erred in rejecting the alleged alternate basis of coverage that the work improved navigation

on an interstate lake. Under the first, the Petitioner's argument is in four parts, and under the second, in one part. We will discuss them in the order set forth in the petition.

First: (1) The Petitioner argues that the approach of the Court of Appeals is inconsistent with the decisions of this Court. With regard to whether or not the Court of Appeals gave consideration to the applicable decisions of this Court and to the "in commerce" and the "related to production" of goods for commerce provisions of the Act, we need do not more than refer this Court to the Opinion of the Court of Appeals starting with the sub-heading "The Supreme Court Authority" beginning on page 29 of the petition. The Court of Appeals carefully considered the more than thirty cases involving these sections of the Act that have been before the Supreme Court. It then carefully recognized and set forth the various principles that have been determined by this Court. The Petitioner argues that the clearing operation undertaken by the Respondent's employees was an integral part of a single construction project which was undisputably in commerce. If it be assumed that other phases of the overall project were "in commerce" in the Fair Labor Standards Act statutory sense (and there has been no need for such a judicial determination in this case and there has not been a congressional legislative determination of that fact), the statement is exactly contrary to the facts as found by both courts below. In fact, this is crucial and the Petitioner refuses to accept the clear and specific factual finding that the clearing operation was not an integral or essential part of the overall project. The Respondent submits that under the facts of this case, the well considered Opinions of both courts below are entirely consistent with the applicable decisions of this Court.

(2) There is certainly no "embarrassing conflict" of opinion and authority between the courts of appeal. Petitioner alleges such a conflict with decisions in the first, fourth, fifth and tenth circuits. The First Circuit decision referred to is *Goldberg v. Nolla, Galib & Cia* and *Goldberg v. Five Boro*, 1 Cir., 291 F. 2d 371. In that case, the court held that if employees' activities otherwise involved them in interstate commerce, the Fair Labor Standards Act applies to them even though the action is carried on by the Government. Concerning the precise point, the court found that there were two contracts involved and that there was no real distinction between the activities of the employees under Contract No. 1, calling for the construction of the technical buildings and the power plant, and Contract No. 2, calling for the erection of support buildings and utilities. The Court stated, on page 373 of 291 F. 2d:

> "According to the testimony below, all these facilities were 'an integral part' of the whole project. The construction work here should be regarded as an entirety and not broken down into its component parts."

Contrast this factual situation with the factual situation of the instant case wherein both courts below found specifically that the clearing work performed was not an integral or necessary part of the overall project and served no useful purpose from the standpoint of navigation, flood control or power. The work was strictly of a local nature for recreational purposes.

The Fourth Circuit decision referred to is *Bennett v. Loftis Co.*, 4 Cir., 167 F. 2d 286. In that case, the court held that a night watchman employed by a contractor engaged in constructing a bridge, which was purely and simply a replacement for an old bridge, was covered by the Act and that the abandonment of the old bridge, the diversion of traffic, the

construction of the new bridge and its substitution for the old, constituted one single integrated project. In other words, it was found to be a fact that the particular construction work in question was an integral and necessary part of the overall work on an instrumentality of commerce. The statement that the project should not be broken down into its various phases was made in the context of meeting an allegation that the work was excluded under the then prevailing "new construction" principle excluding work on facilities not yet dedicated and used in commerce. Again, contrast this factual finding with the factual finding in the instant case concerning the particular work not being a necessary or integral part of or essential to commerce.

The Fifth Circuit decision referred to is *Archer v. Brown & Root, Inc.*, 5 Cir., 241 F. 2d 663. In that case, the court held that employees working on construction of the Lake Pontchartrain Causeway, the production of materials for use in the construction thereof, and the construction of the field plant for production of such materials, were covered by the Act. We direct the attention of the Court to the detailed factual analysis made by the Court of Appeals for the Fifth Circuit beginning at page 667 of 241 F. 2d. The court concluded that the workers on the construction of the field plant were covered not because new construction comes automatically under the Vollmer Tent (*Mitchell v. Vollmer & Co.*, 349 U. S. 427, 99 L. Ed. 1196), but because the workers were in effect also building the bridge. This determination was made not on legal principles but on uncontradicted facts concerning the nature of the project from an engineering and construction point of view. There was involved a complex, integrated operation testing the professional skill of the contractors in that the plant involved was necessary to accomplish the fabrication of the prestressed con-

crete used in the bridge construction. Again, contrast this factual determination with the factual determination in the instant case.

Finally, the Tenth Circuit decision referred to (and this is the decision that has been relied upon all the way through this litigation) is *Tobin v. Pennington-Winter Const. Co.*, 10 Cir., 198 F. 2d 334. This case is discussed and distinguished factually by both courts below. We need do no more than refer this Court to the Opinion of the court below, and particularly to that portion of the Opinion beginning on page 43 of the petition.

Suffice it to say without argument that there is no "embarrassing conflict" or inconsistency in the decisions and the result in each is readily explained by factual differences.

(3) The Petitioner argues that the Courts should not be called upon to review the myriad judgments involved in the planning and execution of a comprehensive project pointing out that there is involved a "complexity of engineering data", "contrariety of views" and the "questions of policy" which, as this Court has emphasized in other contexts, are not generally within the competency of courts to assay. It should suffice to say that we are not here concerned with what this Court has emphasized in "other contexts", and as to whether the courts are to be burdened with difficult factual analysis and determinations, we merely refer to the last decision of this Court, *Mitchell v. Zachry Co.*, 362 U. S. 310, 4 L. Ed 2d 753, wherein such phrases as the following repeatedly appear:

> "* * * This Act casts upon the courts to define in particular cases the less-than-constitutional reach of its scope * * *" (page 758 of 4 L. Ed. 2d)

"And, as here, whether construction work is covered depends upon all the circumstances of the relation of the particular activities to 'commerce' in the statutory sense and setting * * *." (page 758 of 4 L. Ed. 2)

"* * * The primary responsibility has been vested in courts to apply, and so to give content to, the guiding yet undefined and imprecise phrases by which Congress has designated the boundaries of that domain." (page 758 of 4 L. Ed 2d)

"The focus of coverage became 'commerce' not in the broadest constitutional sense, but in the limited sense of § 3 (b) of the statute: 'trade, commerce, transportation, transmission, or communication among the several states' * * *." (page 759 of 4 L. Ed. 2d)

"These are no doubt matters of the nicest degree. They are inevitably so in the scheme and mode of enforcement of this statute." (page 762 of 4 L. Ed 2d)

Apparently the Petitioner takes the position that in construction projects of this type the courts are prohibited from looking into the facts if the Congress has made a legislative determination to authorize and appropriate money for the project. Even if the courts had to accept a legislative determination of the Congress or an executive determination, Respondent points out that there has been no such determination that the activities of these employees (or any other employees on any phase of the overall project) are in commerce for purposes of the Fair Labor Standards Act. To equate the proposition that the clearing work may be such an integral part of the overall project as to justify its being constitutionally included for appropriation purposes with the propostion that it must be so treated by the court for Fair Labor Standards Act purposes does obvious violence to the basic principles often repeated by this Court that many activities may be in commerce in the constitutional sense and not in commerce in the Fair

Labor Standards Act sense, and that the responsibility has been vested in the courts to determine the facts and draw the fine line of demarcation on the basis of "the relation of the particular activity to commerce in the statutory sense".

(4) The Petitioner argues that this case is of substantial importance in the entire area of federal projects. He then cites certain figures (from sources other than the Record) to emphasize the impact of the decision on potentially large numbers of employees. We assume that the Congress is well aware of, and responsible for, the potential impact of legislation and impact has many considertions. Within the Record, we refer this Court to the Opinion of the District Court at [9] on page 561 of 179 F. Supp. The District Court points out that the Corps of Engineers awards construction contracts on the basis of competitive bids and in order to apprize the prospective bidders sets out in its specifications "applicable labor laws". The Fair Labor Standards Act is conspicuous by its absence. The Court states that the Corps of Engineers is naturally interested in getting the work accomplished as fast as possible for as little cost as possible (which cost the taxpayers pay) and cites in Footnote 1 on page 561 an example wherein the Comptroller General has refused to authorize the inclusion of the Fair Labor Standards Act provisions in government contracts and specifications. As appears in the footnote, the Comptroller General states that the inclusion of the provisions would tend to restrict competition and increase the cost to the government of the work to be done. The Record reflects that the Respondent was not running a "sweat shop" but was paying good wages to local citizens, well above the minimum, and was keeping complete and accurate records (R. 52, 56). Therefore, if consideration is to be given to "impact" Respondent suggests that consideration should be given to the im-

pact, recognized by the Congress, on the national treasury in increased costs to the taxpayers. The decisions below are consistent with that congressional recognition and with that "impact."

Second: The second or alternate ground urged by the Petitioner was an after thought that appeared the first time in the Petitioner's brief after the trial in the District Court. It was not listed in answers to interrogatories propounded to the Petitioner and was not raised at the trial. As established by the evidence introduced by the Petitioner at the trial, this was not a navigation project and navigation was not the purpose of the clearing. The factual finding on this issue by the District Court, approved by the Court of Appeals, was that (in the language of the Court of Appeals) the wandering of pleasure boats "into certain of the reservoir's tentacles stretching into adjacent Arkansas is only an incidental circumstance which does not make the present employees' activities of a kind the Act's 'engaged in commerce' language was meant to embrace; and that this secondary issue is "fully controlled by all that has been said on the primary point".

B. THERE HAVE BEEN SUBSTANTIAL CHANGES IN THE FAIR LABOR STANDARDS ACT SINCE THE OPINION OF THE COURT OF APPEALS.

Since this case was tried and the Opinion of the Court of Appeals was handed down, the Congress has enacted the Fair Labor Standards Amendments of 1961, P.L. 87-30, approved May 5, 1961, effective September 3, 1961. These Amendments are comprehensive and, among other things, appear to change rather radically the coverage concept. Prior to the Amendments, the test of coverage was the work performed by the individual employee and to be covered the employee himself had

to engage in interstate commerce or the production of goods for interstate commerce. The business of the employer was not controlling. Under the Amendments, it appears that an employee will be within the law's general coverage if, in any work week, he is employed in "an enterprise engaged in commerce or in the production of goods for commerce". Under this standard, all of the employees of a particular business may be covered by the Act, regardless of the relationship of their individual duties to commerce or the production of goods for commerce. For example, Section 3(s) (4) covers "any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000". On the basis of past volume, this will clearly affect the Respondent and his employees and a great many other construction companies.

If past experience is an accurate guide, the new Amendments will be the subject of considerable litigation and this Court will undoubtedly ultimately be called upon to interpret them. Since this Court has already been called upon more than thirty times to resolve questions under the Act, all of which decisions were carefully considered by the court of appeals, another decision under the Act, without taking into consideration the changes made by the 1961 Amendments, is certainly not required by "special and important" reasons nor by the public importance necessary for the granting of a petition for writ of certiorari.

CONCLUSION

It is respectfully submitted that the courts below made factual determinations fully substantiated by the Record and applied governing principles correctly, and certainly within permissible limits, and, therefore, under all the circumstances, public importance does not require this Court to review this case by granting the petition for a writ of certiorari. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

HERSCHEL H. FRIDAY, JR.
1100 Boyle Building
Little Rock, Arkansas
Attorney for Respondent.

October, 1961

SUPREME COURT, U. S.

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ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

CHARLES DONAHUE,
Solicitor,
MORTON LIFTIN,
Associate Solicitor,
BEATE BLOCH,
Attorney,
Department of Labor,
Washington 25, D.C.

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Respondent's brief in opposition correctly calls attention to the enactment of amendments to the Fair Labor Standards Act on May 5, 1961, which will have an important effect upon the future status of construction employees. The Solicitor General overlooked the relevant provisions of the amendments in the petition for certiorari. Accordingly, this reply brief is filed to remedy the omission and apprize the Court of the government's view concerning their impact upon the instant case.

The enactment of the 1961 Amendments clearly does not deprive all questions of coverage under the earlier

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The enactment of the 1961 Amendments clearly does not deprive all questions of coverage under the earlier

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act of that continuing importance which justifies granting a writ of certiorari. The Fair Labor Standards Act, as amended, retains intact the traditional coverage, on an individual basis, of employees who are engaged "in commerce" or "in the production of goods for commerce," and only in addition extends its protection to other employees who are employed by an "[e]nterprise engaged in commerce or in the production of goods for commerce," as defined by the amendments.[1] Thus, the traditional coverage provisions remain in full effect after the amendments and will continue to be available both as the sole basis of coverage for employees who do not also fall under the new "enterprise" provisions and as an alternative basis of coverage (with superior benefits for a number of years) for employees who come within the 1961 additions to the coverage provisions as well.

The issue of importance presented by a petition for certiorari from a decision construing the traditional coverage provisions of the 1938 Act is, however, plainly affected by the passage of the 1961 Amendments. To the degree that, as a practical matter, one can anticipate that subsequent disputes involving similarly situated employees will be resolved under the new coverage provisions this Court's interpretation of the traditional provisions loses importance. Whether certiorari is justified in a case such as this therefore depends upon the number of similarly situated employees not affected by the amendments, the extent of rights accrued prior to the amendments, the period of

[1] The pertinent provisions of the Act as amended in 1961 are printed in the Appendix, *infra*.

time during which benefits under the amendments are less adequate than those under the traditional provisions, and the extent to which the traditional coverage provisions will continue indefinitely to be used in resolution of wage-and-hour disputes despite the availability of alternative provisions.

With regard to the present petition what must be assessed is the effect of the new "enterprise" coverage provisions on the resolution of future disputes involving employees working on some aspect of an integrated construction project. The Fair Labor Standards Act, as amended, imposes certain wage-and-hour requirements on any "enterprise engaged in commerce," a term which is defined to include any construction business with an annual gross volume of at least $350,000 and which has employees engaged "in commerce" within the meaning of the 1938 Act. Since a number of contractors engaged in work on construction projects such as is involved in this petition will clearly fall under these new coverage provisions as well as the old, it seems plain that the creation of an alternative ground for coverage deprives the decision below of some of the continuing importance which it would otherwise carry. However, there are a number of circumstances which make it equally clear that substantial employee rights are still at stake.

1. The new "enterprise" coverage, whether or not it affects the respondent in this case, is so defined and limited as to exclude from its scope many other companies whose employees are engaged in work on some aspect of an integrated commerce project. Coverage under the new provisions extends only to

employees of enterprises which are large enough to meet the specified annual dollar volume standard—$350,000 in the case of a construction business—and even then, for present purposes, applies only if the enterprise is "engaged in the business of construction or reconstruction".

Enterprise coverage will therefore be inapplicable to many smaller construction companies and to companies, large or small, whose business is not construction or reconstruction although the employees of these enterprises are engaged in work on some facet of a concededly "commerce" project. As the petition points out, the question whether the Act's traditional coverage extends to workers employed on subsidiary phases of construction projects which are clearly interstate in character affects not only this respondent and other concerns engaged in reservoir clearing, but also numerous contractors engaged in similar or analogous activities such as landscaping in connection with federal highway construction. The basis of the decision below—that such aspects are to be viewed in isolation from the overall projects with which they are integrated—permits avoidance of the Act's standards altogether when such work is performed by employers who are not in the "construction" business or who do not meet the $350,000 "annual gross volume" prerequisite to the new "enterprise" coverage.

2. The Act's traditional coverage tests retain substantial importance even for those previously covered employees who come within the new "enterprise" coverage. Not only do they afford the sole

basis for determining employee rights accrued prior to the effective date of the Amendments,[2] but they also provide the framework for the effectuation of a basic purpose of the 1961 amendments—to effect an immediate and accelerated improvement in standards for employees within the scope of the Act's previous coverage. Thus coming within the traditional coverage provisions entitles employees to substantially higher benefits under the amended Act. The minimum hourly wage for previously covered employees was raised on the effective date of the Amendments to $1.15 and will become $1.25 two years thereafter, while the minimum hourly wage for newly covered employees will be $1.00 for three years, $1.15 during the fourth year, and $1.25 thereafter. No overtime requirement will apply to newly covered employees during the first two years the Amendments are in effect, and their maximum workweek will be 44 hours during the third year, and 42 hours during the fourth year, before it is reduced to the 40-hour maximum applicable to previously covered employees.

3. Even aside from the statutory delay in equalization of benefits under the new and old coverage provisions, there is no reason to assume that all disputes involving persons employed on a single facet of an integrated commerce project can more readily be resolved under the new provisions than under the traditional coverage provisions involved in the present petition.

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[2] The present litigation includes an action under Section 16(c) for the recovery of unpaid back wages accruing before the Act's amendment, as well as the Secretary's suit for injunctive relief against future violations of the Act.

In many cases coverage under the traditional provisions may seem at least as clear as coverage under the 1961 amendments. Thus a substantial period of litigation under the new provisions may be required to resolve doubts as to the meaning of "business of construction," as to what employee activities will make an enterprise one "engaged in commerce," and as to the method of computation of the minimum gross volume of business necessary to make the amendments applicable. During this period resolution of questions of coverage of employees who may be covered under both provisions will continue to involve substantial use of the "in commerce" provisions involved in this petition.[3] Indeed there is no reason to assume that, as to many employees working on subsidiary aspects of a commerce project, the applicability of the new provisions will ever be clearer than the "in commerce" coverage is now.

Moreover, the Secretary of Labor—in exercising his authority under Section 16(c) of the Act to sue on behalf of an employee—will in many cases be forced to proceed under the "in commerce" provisions of the 1938 Act. For an action by the Secretary for the recovery of unpaid minimum wages and overtime com-

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[3] The inevitable uncertainty as to the full scope of the new provisions would also adversely affect an employee's rights in suit on his own behalf under Section 16(b), since Section 11 of the Portal-to-Portal Act of 1947 permits the discretionary denial of liquidated damages in such a suit upon a showing that the employer acted "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended * * *."

pensation is limited to cases in which the issues of law have been "settled finally by the courts" and years of litigation may be required to settle finally many of the questions of law posed by the new Act.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

CHARLES DONAHUE,
Solicitor,
MORTON LIFTIN,
Assistant Solicitor,
BEATE BLOCH,
Attorney,
Department of Labor.

NOVEMBER 1961.

APPENDIX

Pertinent Statutory Provisions

Fair Labor Standards Act of 1938, 52 Stat. 1060, *et seq.*, as amended by Act of May 5, 1961, 75 Stat. 65 (29 U.S.C. 201 *et seq.*).

DEFINITIONS

SEC. 3. As used in this Act—

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified

area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

(2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated;

(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;

(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000;

(5) any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excise taxes at the retail level which are separately stated:

Provided, That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner thereof or persons standing in the relationship of parent, spouse, or child of such owner.

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MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

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(b) Every employer shall pay to each of his employees who in any workweek (1) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s)(3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this

section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

(1) not less than $1 an hour duing the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter; * * *.

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MAXIMUM HOURS

SEC. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s) (1) or (4), or by an establishment described in section 3(s)(3), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 13 of this Act by the Fair Labor Standards Amendments of 1961—

(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

(B) for a workweek longer than forty-two hours during the fourth year from such date,

(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.